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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

JEFFREY R. MACDONALD, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Dr. Jeffrey R. MacDonald, repectfully prays that a Writ of Certiorari issue to review the dismissal of Petitioner's appeal to the United States Court of Appeals for the Fourth Circuit from the denial by the District Court for the Eastern District of North Carolina of his motion to transfer under Federal Rule of Criminal Procedure 21(b).

The Order denying the motion to transfer was made and entered on May 30, 1975. The Notice of Appeal was filed June 2, 1975. The Fourth Circuit Court of Appeals dismissed Petitioner's appeal from that Order on July 1, 1975.

OPINION BELOW

The Order of the Fourth Circuit Court of Appeals appears as Appendix A hereto. The Order on Motion to Transfer, made and entered by Judge F. T. Dupree, Jr., in the District Court for the Eastern District of North Carolina appears as Appendix B.

JURISDICTION

The dismissal of Petitioner's appeal was entered on July 1, 1975. This Petition has been filed within 30 days thereof. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

QUESTION PRESENTED

Whether an order denying a motion for transfer in a criminal case, which so substantially prejudices the rights of the petitioner as to constitute a denial of due process, and of which there can be no meaningful post-trial review, is properly the subject of an interlocutory appeal?

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1291:

Final decisions of district courts.

The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had by the Supreme Court.

Federal Rule of Criminal Procedure 21(b):

Transfer from the District for trial.

(b) Transfer in other cases. For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceedings as to him or any one or more of the counts thereof to another district.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved is the Fifth Amendment providing in part that "No person shall . . . be deprived of life, liberty or property without due process of law . . . ."

HISTORY OF THE CASE

In 1970, the Petitioner, Dr. Jeffrey R. MacDonald, a medical doctor, was serving in the United States Army, attached to a Green Beret unit at Fort Bragg, North Carolina. On February 17, 1970, a group of intruders broke into the MacDonald home, stabbed and beat the Petitioner into unconsciousness, and murdered his wife, Colette, and his two daughters, Kristen (age 3) and Kimberly (age 6). Petitioner received a life-threatening wound and was hospitalized for his injuries.

Failing to locate any viable suspects for the crime, Army investigators caused the Petitioner to be arrested and charged on May 1, 1970. Since the nature of the charges required trial by general court-martial, Petitioner's commanding officer ordered the convening of formal proceedings under Article 32 of the Uniform Code of Military Justice, 10 U.S.C. § 832. The presiding officer, an infantry colonel with thirty years service

and substantial court-martial experience, conducted the Article 32 judicial proceedings over a period of five months, including four full weeks of court proceedings.

The Petitioner and the Government were represented throughout by counsel. Chief counsel for the Petitioner was Bernard L. Segal, who was, at that time, a partner in the Philadelphia law firm of Segal, Appel & Natali.

During the Article 32 proceedings, the Government was directed to, and did present all evidence known to it. The Petitioner presented a full defense on the charges and testified under oath at length and was subjected to cross-examination. During the course of the proceedings, substantial evidence was presented which was gathered by psychiatric experts both for the Government and for the Petitioner. Experts for both sides agreed that the Petitioner was "not hiding any evidence" regarding the night his family was murdered. There was also psychiatric testimony that Petitioner was "incapable" of committing the crimes with which he was charged.

Following the conclusion of these judicial proceedings, the Article 32 officer, Colonel Warren Rock, submitted a 90-page report in which he recommended the dismissal of the charges against the Petitioner because they were "*not true*," and further recommended the investigation of a particular woman, who was identified at the Article 32 investigation, because of her possible involvement in the murders. Acting on the recommendation of the Article 32 judicial officer, the officer who had convened the Article 32 proceedings, Major General Edward Flanagan, dismissed the charges against the Petitioner on October 28, 1970. In Decem-

ber, 1970, the Petitioner was honorably discharged from the Army on hardship grounds and began to rebuild his life after the dual tragedy of the brutal loss of his family and the false accusation of complicity in their deaths.

Approximately six months after his discharge from the Army, the Petitioner moved to Los Angeles, California, where he established his permanent residence. Petitioner is still living in the Los Angeles area where he is Director of Emergency Medicine at a major hospital there. In 1972, Petitioner's chief counsel, Bernard L. Segal joined the faculty of a California Law school, moved his family and took up permanent residence in the San Francisco area.

From January, 1971, to January, 1972, the Criminal Investigation Division (CID) of the United States Army conducted what it has represented was a complete, extensive and thorough reinvestigation of the murders of the MacDonald family. In early 1972, the CID requested the United States Department of Justice to seek an indictment of the Petitioner for the murders of his family. The Department of Justice refused to do so and took no other substantive action on the requests for the indictment of the Petitioner because no evidence existed to support such a charge.

Sometime after June, 1972, however, Alfred Kassab, the step-father of Petitioner's deceased wife, who had been a staunch supporter of Petitioner at the Article 32 proceedings, and who testified in his behalf in the strongest possible terms in 1970, inexplicably turned against Petitioner. Kassab began demanding that the Department of Justice prosecute Petitioner. He dis-

cussed his demands with newspaper reporters, and stated publicly that both the Army and the Justice Department had been incompetent in their investigation and prosecution of Petitioner. Kassab repeatedly and persistently threatened the Department of Justice with adverse publicity, Congressional intervention and legal action, should it fail to prosecute Petitioner.

Apparently, in an attempt to forestall Kassab's criticisms of the Department of Justice, Carl Belcher, Chief of the General Crimes section of the Department of Justice, wrote Kassab on January 10, 1974, and stated:

> . . . the evidence currently available in this case is insufficient to warrant prosecution against Dr. MacDonald at this time.

On March 10, 1974, the New York Times reported that the Department of Justice was still of the position that there was no basis to prosecute the Petitioner.

Having been informed of the Department's decision not to present evidence against Petitioner to a grand jury, Kassab then undertook to force the Department to reconsider its decision. He did this by publicly accusing the Department of a "cover-up," and by signing "charges" of murder against Petitioner. These "charges" were delivered personally by Kassab to Judge Butler, Chief Judge of the United States District Court for the Eastern District of North Carolina in April, 1974. All of this was accompanied by newspaper publicity generated by Kassab. In response to Kassab's "charges," Judge Butler addressed a letter to the Justice Department requesting comments and asking what action the Department would take on the "charges."

Shortly after Judge Butler forwarded the "charges," which contained no new evidence against the Petitioner, the Department of Justice determined that a special grand jury would be convened with a view to prosecuting the Petitioner. While the Grand Jury was styled an investigative grand jury, the Petitioner was the only person who was presented to it as a suspect.

This decision of the Department of Justice to convene a special grand jury for the purpose of indicting the Petitioner represented a reversal of the position the Department had held for three years. It was reversed after the filing of the Kassab "charges," although they contained no new evidence.

The Department of Justice officials would not stand by their decision that prosecution of Petitioner was unwarranted, because of their bureaucratic fear that charges of "cover-up" would be made against them. They further feared, that in the post-Watergate era, such accusations would jeopardize their personal job security.

HISTORY OF THE PROCEEDINGS

On January 24, 1975, the Grand Jury returned an indictment against the Petitioner. Defendant filed a number of pre-trial motions, including a motion for transfer under Federal Rule of Criminal Procedure 21(b) on the grounds of convenience and in the interests of justice. That motion sought to have the trial of Petitioner's case transferred from the Eastern District of North Carolina, where the indictment was brought, to his home district, the Central District of California.

Lengthy evidentiary hearings were conducted on the motion to transfer. The only evidence presented was

by the Petitioner. The Government rested solely upon its written argument. The facts which were established, without rebuttal, are as follows:

1. That Petitioner is a young doctor, a middle-class professional person, without any income other than what he earns as the Director of Emergency Medicine in a hospital in the Los Angeles area. The record also shows that he does not have unusual assets.[1]

2. That Petitioner's defense, including trial in California, will cost him not less than $150,000 and as much as $300,000.[2]

3. If the trial of the Petitioner's case is not transferred and instead remains in the Eastern District of North Carolina, the cost of Petitioner's defense will be *doubled,* amounting to between $300,000 and $600,000.[3]

4. The Petitioner has been offered an extraordinary range of free services, legal and secretarial help, office space and supplies by friends and supporters in the Los Angeles area. Evidence of the above was submitted by affidavit to the District Court. Petitioner has no friends nor supporters in North Carolina and would have to pay for all of these services there.

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[1] The Petitioner's financial statement, submitted under oath as an exhibit to the District Court, is appended as Appendix C hereto.

[2] The Petitioner's defense in the military proceedings, which were considerably shorter and less complicated than will be his defense to the present indictment, cost the Petitioner, his family and his friends, $50,000. At that time he also received considerable free assistance at the Army's expense, which is not available to him now. An anticipated budget for Petitioner's defense was submitted, under oath, to the District Court and is appended hereto as Appendix D.

[3] See Appendix D for comparative figures.

5. The effect of doubling the cost of the Petitioner's defense will be to render him bankrupt.

6. The Petitioner will lose his only source of income if he is compelled to stand trial in the Eastern District of North Carolina. If the trial is held in Los Angeles, the record in the District Court is undisputed that he will be able to continue to perform certain of his administrative duties and to earn a significant portion of his income with which to maintain his defense.[4]

7. The refusal to transfer Petitioner's case to California will result in the loss to him of the principal defense counsel who has continuously represented him since the military proceedings were instituted in 1970. Professor Bernard L. Segal has represented the Petitioner throughout his five-year struggle to be vindicated of these charges, commencing with the Army prosecution through the pre-trial motions in this case.

Having moved to California and become a professor of law in San Francisco, Professor Segal will be unable to represent the Petitioner if the trial is in the Eastern District of North Carolina. However, Professor Segal will be able to remain as Petitioner's counsel if the trial is held in California.

8. The loss of Professor Segal as counsel for the Petitioner will result in an extraordinary delay of the trial of the case. Petitioner will be required to retain new counsel. The Government has represented to the District Court that if one of its assistant counsel were not able to remain in the case that it would take nine months for another assistant counsel to become familiar with the case.

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[4] These facts were supported by affidavit and by specific findings to that effect by the District Court judge.

9. The trial of the case in California will not represent a substantially greater inconvenience to the witnesses than will trial in North Carolina. The Petitioner intends to call 110 witnesses, exclusive of character witnesses, who may number an additional 25 persons. The Government intends to call as many as 108 witnesses. Of the 218 fact witnesses, for both sides only a small number now reside in the Eastern District of North Carolina. The great bulk of witnesses in the case are Army personnel who have been transferred and have moved throughout the United States and to seven foreign countries since 1970.

10. The trial of Petitioner's case, if it remains in the Eastern District of North Carolina, will be held in Raleigh. The overwhelming majority of the witnesses will have to be flown to the trial. Raleigh has grossly inadequate and inconvenient airline service. This is to be contrasted to the facts in the record showing that Los Angeles, California, is one of the most accessible cities in the United States.

11. The transfer of the case to the Central District of California will not delay the trial of the case. All pre-trial motions in the case are being heard and decided by the District Court of the Eastern District of North Carolina. The dockets in both the Eastern District of North Carolina and the Central District of California show that criminal cases in both districts are being brought to trial in approximately three and one-half months from arraignment. This is better than the national average for all U.S. District Courts. As of July 1, 1975, the Eastern District of North Carolina has only two regular District Judges. The Central District of California has seventeen District Judges and eight full-time Magistrates. The involvement of

one of the two judges in the Eastern District of North Carolina in a single case for any lengthy period of time will seriously disrupt the judicial business in that District. The trial of this case in the Central District of California will not materially affect the disposition of judicial business in that District.

The Government presented no evidence that the transfer would cause any impediment to the prosecution of its case. The Petitioner, on the other hand, demonstrated that extraordinary hardship would result if a transfer were not granted. Despite the evidence of the Petitioner being uncontroverted on each of the points asserted, and despite the serious constitutional issues involved, the District Judge denied the Petitioner's request for transfer.

Faced with the District Court's decision, the Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Fourth Circuit on June 2, 1975. On motion by the United States, the Fourth Circuit Court of Appeals dismissed the appeal on July 1, 1975, as having been taken from a non-appealable order. The Petitioner now seeks review by this Court, by way of this Petition for Writ of Certiorari, in order (1) to prevent Petitioner's denial of due process rights; and, (2) to assure that, if Petitioner is required to go to trial on these very serious charges, that it be accomplished without forcing him into bankruptcy and with the full assistance of and representation by his chief counsel of five years standing.

REASONS FOR GRANTING THE WRIT

I. AN ORDER DENYING A MOTION FOR CHANGE OF VENUE, IN THE FACE OF UNCONTROVERTED EVIDENCE THAT SUCH A DENIAL WILL DEPRIVE THE DEFENDANT OF EFFECTIVE ASSISTANCE OF COUNSEL AND UTTERLY BANKRUPT HIM, IS AN APPEALABLE ORDER WITHIN THE MEANING OF 28 U.S.C. §1291.

A. The Concept of Appealability Within the Context of 28 U.S.C. § 1291.

It has long been the rule, imposed by Congress, that this Court and the several United States courts of appeals have jurisdiction to hear appeals only from "final" orders. The original harshness and inflexibility of the finality rule led to a lengthy struggle by generations of federal litigants which has resulted in the engrafting of statutory [5] and judicial exceptions to the rule.

A primary inroad into the finality rule was made by this Court in its decision in the case of *Cohen* v. *Beneficial Finance*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed 1528 (1948). In that case, Justice Jackson, writing for the majority, held that there existed a "small class of claims of right which required appellate review before trial." He described these as claims:

> . . . separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction.
>
> 337 U.S. at 546.

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[5] See 28 U.S.C. § 1292.

This Court's decision in that case upheld the appealability of an interlocutory ruling which substantially prejudiced that appellant's ability to proceed with the litigation. The brief discussion of the issue of appealability in the *Cohen* decision made this Court's position clear: even the paramount policy against interlocutory appeal does not require indifference to the interests of justice.

The confused tangle of lower court litigation on the issue of appealability since the establishment of the *Cohen* exception is history. What was for the *Cohen* Court a rational exception to an inflexible rule, has become a monstrous headache for the lower federal courts as countless litigants over the ensuing 25 years have attempted to urge uniqueness and the need for a remedy for their particular interlocutory grievance. In essence, the courts of appeals have been required to decide the appealability of innumerable varieties of interlocutory orders.[6]

The burden is no less for the federal litigant who is very often unsure whether his proper remedy lies in mandamus or in direct appeal. In order to insure proper protection of a client's rights, an attorney often is compelled to file *both* a petition for mandamus and an appeal.[7] The result is a duplication of effort by all

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[6] Professor Moore, in his treatise on federal courts, required an extended section for an attempt to reconcile many of these areas. 9 *Moore's Federal Practice and Procedure*, pp. 130-137, 152-196. One brief example of the confusion in the area is the law on the appealability of orders compelling testimony or the production of documents. Four circuits have held such orders not appealable, four others have held them appealable, and the Fifth Circuit has held both ways.

[7] See *Cohen* v. *Beneficial Finance, supra,* 337 U.S. at 547.

parties and a multiplying burden on the appellate courts.

The law regarding the appealability of orders in federal criminal cases is no less confusing. While a *Cohen* rationale has been applied in a few exceptional cases,[8] the overwhelming majority of decisions in the courts of appeals regarding criminal interlocutory orders have relied on language such as that in *DiBella* v. *United States*, 369 U.S. 121, 82 S.Ct. 654, 7 L.Ed. 2d 614 (1962), as establishing an absolute bar against interlocutory appeals in criminal cases. This approach ignores important statements by this Court in cases such as *United States* v. *Johnson*, 323 U.S. 273, 65 S.Ct. 249, 89 L.Ed. 236 (1944), regarding the fundamental nature of certain interlocutory rights guaranteed to criminal defendants. Many of these rights are meaningless rhetoric unless they are enforceable before trial.

For criminal defendants, the uncertain application of the *Cohen* exception by lower courts has meant that there is virtually no *Cohen* exception in criminal cases at all. This lack of effective remedy for the vindication of certain rights is a critical deficiency requiring the type of clear direction which only a decision by this Court can provide.

B. The Cohen Exception Should Be Held Applicable to a Very Limited Class of Criminal Transfer Motions

Thus, there do exist certain rights of criminal defendants which must be raised on an interlocutory appeal if they are to have any meaning at all. These are rights unrelated to the question of the guilt or

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[8] *Kyle* v. *United States*, 211 F.2d 912 (9th Cir. 1954); *Lansdown* v. *United States*, 460 F.2d 164 (4th Cir. 1972).

innocence of the defendant, which are irreparably lost if not vindicated before trial. Therefore, notwithstanding the strong policy against interlocutory appeals in criminal cases, denial of such rights is a proper subject of appeal before trial. A limited class of transfer cases falls squarely into this category and they are defined in the following section.

1. Classification of transfer motions.

A proper analysis of the issue of appealability of an order dealing with a change of venue requires that the types of venue change available to a criminal defendant under Rule 21 of the Federal Rules of Criminal Procedure allows transfers on the following grounds:

(a) inability to obtain a fair trial in the original district due to prejudicial pretrial publicity;

(b) transfer for convenience and in the interest of justice.

It is a well recognized rule that denial of a motion under Rule 21(a) is properly reviewed upon post-conviction appeal. It is only at that time that the appellate court can fully review the issue in terms of the impact of the prejudicial publicity on a defendant because only then does it have the complete record of pretrial and trial publicity, voir dire of the jury venire, and the procedures used by the lower court to mitigate the effect of such publicity during trial. Further, the prejudice to a defendant, if any, may clearly be remedied by the granting of a new trial.

Motions made for the convenience of the parties or in the interest of justice, under Rule 21(b), can be divided into two groups. The first encompasses those

motions which are made because the transfer will simply result in a more convenient trial for a defendant if tried in a district other than the one in which the indictment is brought. The motions can be denominated as "mere convenience" transfer motions.[9]

The second type of motion is made by a defendant when the denial of the motion will result in the substantial impairment of the conduct of the defense or cause irreparable injury to his post-trial livelihood or personal life. These are appropriately characterized as "due process" 21(b) motions. It is this second type of 21(b) transfer motion on which the Petitioner seeks to have the Court focus its attention.

And, it is this second type of transfer motion which Petitioner urges should be brought within the special exception to finality under *Cohen*. Denial of a "mere convenience" motion will usually not result in severe detriment nor permanent injury to a defendant nor to the conduct of his defense. It is this type of matter which should normally be entrusted *solely* to the discretion of the District Court Judge.

The second, or "due process" 21(b) motion, however, is of an entirely different character. By its very definition, the relief requested from the trial court is so fundamental that denial will cause substantial prejudice to the conduct of the accused's defense, or to his livelihood or personal life, after trial. Further, the injury resulting from an improper denial is irremediable after trial.

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[9] By way of comparison, the Article 32 proceeding, where the motion may be made by a defendant to obtain trial in a forum where a more favorable jury may be empaneled.

It is appropriate for the Court to ask, what wrongs are so great or egregious that they cannot be remedied upon post-conviction appeal? Certainly, three of the wrongs which will result in this instance from a denial of change of venue from the Eastern District of North Carolina to the Central District of California are so great and so egregious as to constitute a denial of due process and to be irremediable by post-conviction appeal:

(1) Irreparable injury to the professional and/or personal life of a defendant presumed innocent under the law. Included in this area *must* be the incipient bankruptcy of a defendant because of extraordinary added costs arising from the failure to grant change of venue.

(2) Deprivation of long-held and/or trusted counsel.

(3) Impairment of the ability of a defendant and his counsel to conduct the most effective defense of the case.

2. Post-conviction appeal is an inadequate remedy for denial of a "due process" transfer motion.

The Government will doubtless urge that where such a serious injury has been done to a defendant it will most certainly be correctable upon post-conviction review. Such a contention is wholly inadequate to meet the interests involved in this case and should be rejected.

In the first instance, the contention assumes that there will be a post-conviction review. This is little solace to offer a defendant who has been acquitted but who has been rendered bankrupt and has had to sacri-

fice career and professional position to maintain a successful defense at a lengthy trial on very serious charges. That defendant may have the sympathy of the judicial system, but very little else, and certainly nothing tangible.

The reliance upon post-conviction review ignores an even more important point which is not present for the defendant wronged by an improper denial of a Rule 21(a) motion to transfer because of prejudicial publicity. Where such a motion is wrongfully denied, the record simply becomes stronger as the trial goes on. Often the offending media coverage will continue through trial. The suspected biases of the community will become manifest in the voir dire of the jurors. And, inadequate protection by the trial judge in handling this delicate problem will become more evident.

But, with a "due process" type 21(b) motion, the trial record will most likely not reflect the grievous harm to the defendant from the failure to grant the change of venue. As a defendant's resources diminish, he is less able vigorously to prosecute his own defense. Trial records do not give any insight into these difficulties. If a defendant is deprived of long-standing counsel by a District Court's denial, there is never any way which the significant, but subtly expressed, prejudices incurred thereby can be reflected in a trial record.

3. The extraordinary remedy of mandamus is an inappropriate remedy for denial of a "due process" transfer motion.

The extraordinary remedy of mandamus is as ill-suited to this task as the remedy of post-conviction review. As this Court is well aware, the courts of ap-

peals have been loath to grant a writ of mandamus [10] for a change of venue. The words of Judge Friendly, in the case of *A. Olnick and Sons* v. *Dempster Bros., Inc.*, 365 F.2d 439 (2d Cir. 1966), aptly expresses their attitude:

> In the fifteen years since this court first announced willingness to consider such applications, *Ford Motor Co.* v. *Ryan*, 182 F.2d 329 (2d Cir. 1950), we have never granted one. But even so dismal a record naturally does not prevent counsel from accepting our invitation . . . .
>
> 365 U.S. at 446.

Assuming, arguendo,[11] that the review of a transfer motion by petition for a writ of mandamus is appropriate, the remedy is woefully inadequate for the securing of the fundamental rights under discussion here. These are pretrial rights so basic to our system of justice that they ought not to be entrusted to the vagaries of mandamus. Rights such as those discussed above should be protected by the same standard of review which is firmly secured for fundamental rights arising during trial, such as *Miranda* and Fourth Amendment rights.

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[10] The Third, and Sixth Circuits have flatly refused to review transfer motions by mandamus. *All States Freight, Inc.* v. *Modarelli*, 196 F.2d 1010 (3d Cir. 1952); *Ratke* v. *Picard*, 283 F.2d 945 (6th Cir.), *cert. denied*, 364 U.S. 927, 81 S.Ct. 353, 5 L.Ed. 2d 266 (1960). See also 9 *Moore's Federal Procedure and Practice* at 176-177.

[11] This Court cast doubt upon the availability of mandamus as a remedy in cases such as this, by way of dicta, in *Platt* v. *Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 244, 84 S.Ct. 769, 11 L.Ed. 2d 674 (1964).

4. The remedy of immediate, interlocutory appeal can secure these fundamental, pretrial rights.

The Court may well be concerned that further review in this area will open a new Pandora's box of interlocutory appellate litigation. Such will not be the case.

The issue presented to the Court herein is quite narrow. It is wheher an order in a criminal case, which so substantially prejudices the rights of a defendant as to constitute a denial of due process, and of which there can be no meaningful review after trial, is not a proper instance to permit appellate review of an interlocutory order. The framework of the proposed exception can be well-defined and is firmly grounded in the language of Justice Frankfurter, writing for the majority in *DiBella* v. *United States, supra:*

> Since the procedural aspects of law deal with the practical affairs of men and do not constitute an abstract system of doctrinaire notions, *Congress has recognized the need of exceptions* for interlocutory orders in certain types of proceedings *where the damage of error unreviewed before the judgment is definitive and complete,* see *Collins* v. *Miller,* 252 U.S. 364, 370, *has been deemed greater than the disruption caused by intermediate appeal.*
>
> 369 U.S. at 124 (Emphasis added.)

Petitioner urges that this Court hold that the *Cohen* exception to finality be applied to criminal cases such as this as it has been applied to a limited number of civil cases. In other words, he urges this Court to permit an appeal from an interlocutory order in cases where the order appealed from amounts to a denial of due process of law, constitutes an infringement of a specific fundamental right, is not meaning-

fully reviewable after trial, and involves an issue clearly separable from the issue of guilt or innocence of the defendant.

5. This case is an appropriate case for the decision of this important issue.

While the general policy against pre-trial appellate review of interlocutory matters may be generally salutary, there are, nevertheless, certain factual situations in which the issues raised constitute a denial of due process. When that occurs in a case where post-trial review will not be able to right the denial of due process which has occurred, an exception to the non-appealability of interlocutory orders is fully appropriate.

The facts documenting the need for change of venue in the instant case are clear and compelling. They are such that an exception to the finality rule thereon can be drawn narrowly and precisely. Petitioner asserts not one but two grounds upon which he has been denied due process of the law by the District Court. However this Court may view the stream of interlocutory petitions for certiorari, the facts here demand attention and relief. The Petitioner, a middle-class professional, without unusual assets, is presently facing a lengthy trial in a forum 3000 miles from his home and, after his second acquittal, will face the tragedy of personal bankruptcy. It is a trial in which few of the witnesses are within the District where it will be held.

Petitioner is unable to find a single case wherein a defendant was required to move for change of venue in the face of personal bankruptcy and loss of counsel of long standing. The complexity and mobility of our society can only increase the likelihood that defendants, from all walks of life, will face the prospect of

trial in a distant and grossly inconvenient forum. As the number of such situations grows so will the number of cases where, as here, the immense distances will affect the defendant's very ability to obtain a fair trial. Only the remedy of interlocutory appeal will adequately safeguard the fundamental rights of Petitioner and his successors.

II. THE DUAL BURDENS OF THE BANKRUPTCY OF THE PETITIONER AND THE DENIAL OF THE EFFECTIVE ASSISTANCE OF COUNSEL WHICH ARE THE INEVITABLE RESULTS OF THE DISTRICT COURT'S REFUSAL TO GRANT PETITIONER'S MOTION FOR TRANSFER, CONSTITUTE AN ABUSE OF DISCRETION AMOUNTING TO A DENIAL OF DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AMENDMENT OF THE CONSTITUTION.

The question presented to this Court by the instant case is what showing is necessary for a denial of a motion for transfer under Rule 21(b) to amount to a denial of due process of the law? The showing made by the Petitioner here has been that the denial of his motion to transfer will result in his personal bankruptcy and the loss of the assistance of his counsel of five-years standing. It is sufficient to constitute a prima facie showing of a denial of due process.

A. Failure to Transfer This Case Will Bankrupt the Petitioner.

After the military proceedings in 1970 against the Petitioner were held to be *"not true"* and were dismissed, Petitioner moved to Los Angeles, in the Central District of California. He has resided there now for more than three and one-half years. He is the Director of Emergency Medicine in a major hospital there, owns a home in that District, and his widowed mother also lives there.

In the final Seventh Circuit decision in *Platt* v. *Minnesota Mining & Manufacturing Co.*, 345 F.2d 621 (7th Cir. 1965), the Court pointed out that the proper weight to be given to the residence of the defendant is determined in light of its effect upon the convenience in handling the case. *Platt, supra,* 345 F.2d at 682. Here, the impact of the Petitioner's residence, which is 3000 miles from the forum in which the trial is scheduled, is enormous and cannot be dismissed lightly.

The trial of this case cannot help but be lengthy. Estimates in the District Court varied from six weeks (the Government's latest upward estimate) to three months (Petitioner's estimate) for the trial of this case.[12] Petitioner will be required to be absent from his home and professional duties for a twelve week period. If the trial were to be held in Los Angeles, the Petitioner would be able to continue in his administrative capacity at St. Mary's Hospital and thus continue earning income throughout the trial. The directors of the hospital have confirmed the viability of this arrangement.

If, however, the trial is held in the Eastern District of North Carolina, the result is the opposite. Petitioner will be unable to have any employment whatsoever. During the period of heaviest expenditure for his de-

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[12] By way of comparison, the Article 32 proceeding, where the evidence and the issues were considerably simpler, consumed four full weeks of in-court sessions. (In the finest military tradition, the Article 32 was convened at 8 a.m. and recessed at 5 p.m.) The Government and the Petitioner have indicated that they will call over 100 fact witnesses each. Petitioner also desires to call at least 25 character witnesses. It is not unreasonable to expect that the voir dire will be extensive as well, since there has been substantial pre-trial publicity in this case. An estimate of less than 3 months under the circumstances is incredible.

fense, he will be utterly without income. It is the combination of complete loss of income, combined with the dramatic increase of cost, which will cause Petitioner's bankruptcy if the trial of this case is held in North Carolina.

It is not merely the disruption of Petitioner's affairs or the total loss of income which is involved here. Trial of this case in the Eastern District of North Carolina will *double the cost of Petitioner's defense.* Current planning of the Petitioner's defense indicates that the defense team will include, throughout the trial of this case, a full-time staff of eight to ten persons. During a trial of this case in Raleigh, North Carolina, the Petitioner will be required to house, feed and provide office space and equipment for these persons.

On the other hand, if the trial is held in the Central District of California, the record shows Petitioner will receive outstanding amounts of assistance, including free legal assistance, lodging, meals, office space and secretarial help for the conduct of his defense there.[13] The result is that, if the trial is held in North Carolina, the cost of Petitioner's defense, estimated at $150,000 to $300,000 if held in the Central District of California, will be catapulted to the astronomical and bankrupting sum of $300,000 to $600,000.

These figures and the 2 to 1 ratio of costs between the forums, is not based upon the mere speculative assessment of costs by counsel for the Petitioner. At the close of three days of pre-trial hearings in May, 1975, a detailed statement of expenditures was submitted to the District Court by affidavit, with a comparison for a projected equivalent period in Los Angeles. The fig-

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[13] See p. 9, *supra.*

ures speak for themselves; the three days in Raleigh cost $5,380.00, the same three days in Los Angeles would have cost $2,660.00.[14]

Of course, the demonstration of tremendous additional expense may not, of itself, be sufficient to establish that a trial in the distant forum of the Eastern District of North Carolina will deprive the Petitioner of his right to due process of the law. When the additional burden is considered in light of the Petitioner's personal financial situation, however, the denial of due process becomes readily apparent.

In *Platt* v. *Minnesota Mining and Manufacturing,* 314 F.2d 369, 375 n. 3 (7th Cir. 1963), the Seventh Circuit held that the added expenditure of $100,000 for a multimillion dollar corporation was sufficiently large that a transfer was compelled. Significantly, there is no information given as to what percentage of 3M's defense this $100,000 cost would have constituted.

Dr. MacDonald, Petitioner herein, is not a multimillion dollar corporation, however. He does not even possess any unusual assets. Dr. MacDonald is a middle-class professional person with an automobile, a boat, a home and a mortgage on all three. The three and one-half years since his discharge from the Army did not result in the accumulation of a vast personal fortune. It is not difficult to see how the burden of trial in Los Angeles alone, costing between $150,000 and $300,000 will be overwhelming for a person with a net worth of only $36,000.

The comparison borders on the ludicrous when the tax aspects of these expenses are considered. For the

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[14] The Petitioner's affidavit, submitted in evidence to the District Court is appended as Appendix E hereto.

corporate giant, 3-M, its $100,000 expenditure in defending the anti-trust prosecution would have been wholly tax deductible, *Commissioner* v. *Tellier,* 383 U.S. 687, 86 S.Ct. 1118, 16 L.Ed. 2d 185 (1966), thereby reducing the effective expenditure by 50%. For Dr. MacDonald, no part of his legal expenditures will be tax deductible. For a single person in Dr. MacDonald's personal income bracket, this will mean that, for every dollar necessary to defend himself, he will be required to earn two dollars of gross income. Put more bluntly, trial of this case in the Eastern District of North Carolina will require the Petitioner, though wholly deprived of income, to earn $600,000 to $1,200,000 to pay for his defense. Can there be any doubt that such a tremendous burden will bankrupt the Petitioner?

This Court has long recognized, as did the Founding Fathers, that the laying of venue in a district far from a defendant's home involves more than a question of mere procedure. *United States* v. *Johnson, supra,* 323 U.S. at 273. The instant situation presents a problem never foreseen by the authors of the Constitution. For them, to lay venue in the locale where the crime was committed, was virtually a specific guarantee that the defendant would be tried where he resided and would have the help and support of family and friends in the defense of his case.

The development of our highly mobile society has nullified this presumption. In the case of the *United States* v. *Johnson, supra,* 323 U.S. at 273, this Court grappled with the troubling issues raised by multi-venue crimes. In the words of Justice Frankfurter, writing for the majority:

> [Venue matters] touch closely the fair administration of criminal justice and the public confidence

> in it, on which it ultimately rests. . . . *Questions of venue in criminal cases,* therefore, are not merely matters of formal legal procedure. They *raise deep issues of public policy in the light of which legislation must be construed.*
>
> 323 U.S. at 276 (Emphasis added.)

The problems have now grown beyond those arising in multi-venue cases. The body of law which holds that the Government is under no duty to exercise reasonable diligence in procuring an indictment will more and more frequently result in situations similar to the one at bar where the Petitioner, in an effort to pursue a normal life, will have moved, reestablished his residence, and then face prosecution in a distant forum.

This was the situation contemplated when the Federal Rules of Criminal Procedure were amended in 1966 to permit transfer of cases to districts where there was no venue. And under the amended Rule, certainly, Petitioner, an individual, is entitled to every bit as much consideration as was accorded the corporation, Minnesota Mining and Manufacturing.

B. Failure to Transfer This Case Will Result in the Denial to the Petitioner of Effective Assistance of Counsel.

The evidence presented to the District Court showed that, at the present time, it will be impossible for the Petitioner's chief counsel, Professor Bernard Segal, to continue as Petitioner's counsel through an extended trial in the Eastern District of North Carolina.

Professor Segal has served as chief counsel to the Petitioner at every stage of this case over the past five years: from the commencement of the Army proceed-

ings in 1970, through the three and one-half years of efforts to obtain a final resolution of the matter from the Department of Justice, and throughout the current proceedings. Since his permanent move to California in 1972, Professor Segal has undertaken substantial professional commitments. Though these commitments will certainly be curtailed during the lengthy trial of this serious criminal case, they *cannot* be wholly abandoned. Trial in the Central District of California will mean that Professor Segal will be within easy commute distance of his offices, University and family in San Francisco.[15]

By comparison, if the case is tried in North Carolina, Professor Segal will be unable to maintain direct contact with his commitments over a 3000 mile distance. Round-trip travel from Raleigh to San Francisco requires *two* days.[16]

The only other attorney with close familiarity with the case is Michael J. Malley. Mr. Malley testified at length during the hearing on this matter regarding his personal availability in the case. He is currently employed by a law firm in Washington, D.C., where his practice involves government contract representation of corporate clients. Aside from brief experience under the military justice system five years ago, he has never

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[15] Among the exhibits introduced before the District Court were a complete set of airline schedules for the alternate forums. The schedules for Los Angeles reflect that there are almost semi-hourly, round the clock, flights between Los Angeles and San Francisco. The round trip air fare is approximately $45.00.

[16] The airline schedules in evidence before the District Court reflect the fact that there are no direct non-stop flights from Raleigh to San Francisco, and that travel between the two cities is a bothersome, time consuming process. The round trip air fare between the two cities is approximately $380.00.

practiced criminal law. While he has assisted in the case since its beginning as associate counsel, Mr. Malley cannot and will not accept the responsibility of chief counsel. His reasons for this are of the highest order and are entitled to be respected. He is a long-time personal friend of the Petitioner.[17] His personal feelings are very strongly involved in the case, to an extent that he could not and should not function as chief counsel. Further, he has no significant experience in the trial of criminal cases, let alone a case involving a charge of triple homicide.

Yet, Petitioner does not rely on the loss of his chief counsel for five years as the sole basis for his allegation that he will be denied the effective assistance of counsel by the denial of his motion for transfer. The added expenditure of trial in the distant forum will undoubtedly inhibit the conduct of Petitioner's defense no matter who his counsel may be.

As Petitioner has shown by unrebutted evidence before the lower court, he has substantial offers of free legal assistance, clerical and secretarial help, and office space in the Central District of California. All of these services are essential elements in the conduct of the defense of a protracted, serious criminal case. They are more than mere conveniences; rather, they are essential elements in the preparation for and conduct of any important case. None of these services will be available to the Petitioner in the Eastern District of North Carolina without substantial additional expenditures. It is

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[17] Mr. Malley and Dr. MacDonald were roommates at Princeton University. Mr. Malley knew the deceased wife of Dr. MacDonald.

tragic indeed to contemplate the financial ruin and the short-changing of the defense of an accused who has already once proven that he has been wrongfully and falsely charged.

This Court has long held that the right to counsel is not satisfied by the mere presence of an attorney at trial. The presence of a lawyer is necessary at every critical stage of criminal proceedings to ensure due process. *Coleman* v. *Alabama,* 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed. 2d 387 (1970). It has also been long recognized that certain corollary rights are as important to the defense of a case as the presence of a lawyer. An embodiment of this principle is found in Rule 17 of the Federal Rules of Criminal Procedure which provides for the payment of witnesses' expenses by the court for indigent defendants. The result of the trial court's ruling in this case will be either to straitjacket Petitioner's defense because of lack of funds, or to place Petitioner's defense under the stringent limits of a court-financed indigent after his defense has bankrupted him.

C. Denial of Petitioner's Motion Constitutes a Denial of Due Process.

A full examination of the merits of this case will demonstrate that the nature and scope of the questions involved herein are of critical importance.

The rule that motions for transfer, in both civil and criminal cases, should normally be left within the discretion of the trial court is a long-standing one. Experience bears out that most rulings on such motions are not so egregious as to warrant any form of appellate relief. Nor are the interests at stake normally suf-

ficient to warrant special attention by the appellate courts. In our increasingly complex and highly mobile society, however, there will be an increasing number of prosecutions brought by the Federal Government, for reasons of convenience or otherwise, in a forum distant from the defendant's home, residence or headquarters of operations.

There is the strong constitutional undercurrent which is unsettled by a procedure which allows the United States, the largest and most powerful federal litigant, to demand that a person be tried in a particular forum, and although failing to introduce evidence of its own in support of why that forum is to be given preference over the one to which a defendant is seeking transfer, to nonetheless succeed in that demand and defeat the need for a change of venue of a person of ordinary means who faces trial in a lengthy criminal case. Put in terms of this case, the United States of America, with all its vast resources is able to insist that Dr. Jeffrey MacDonald, a middle-class California doctor with a net worth of $36,000, defend the most serious of charges in a forum 3000 miles from his home, a forum in which most of the witnesses do not reside, and one where extraordinary hardships of financial ruin and loss of chief counsel cannot help but result. To force Petitioner to defend himself under such circumstances is nothing short of an absolute denial of due process.

D. Application of the *Platt* Criteria to the Facts of This Case.

The standards for the exercise of a District Court's discretion on a motion to transfer were established in the case of *Platt* v. *Minnesota Mining & Manufacturing Co., supra,* 376 U.S. at 243-244, where this Court approved an enumeration of ten factors which should

be weighed in balancing the inconvenience and determining the interests of justice:

1. location of the Petitioner
2. disruption of Petitioner's affairs
3. expense to the parties
4. location of counsel
5. relative docket conditions
6. relative accessibility of alternative forums
7. location of possible witnesses
8. location of domuments and records likely to be involved
9. location of the events in issue
10. other special elements or circumstances

Petitioner has made an overwhelming showing of need under these factors. And, an examination of each of these factors reveals that *there are no significant ones which weigh against* transfer. The overwhelming balance lies in Petitioner's favor.[18]

1. Relative docket conditions of the two forums.

The relative docket condition of the districts involved in a proposed change of venue is a factor which has been examined by appellate courts in cases involving writs to compel or halt interdistrict transfers. In the *Platt* case the Seventh Circuit pointed out that, for a valid comparison, a proper analysis must be made of the available statistics. *Platt* v. *Minnesota Mining & Manufacture, supra,* 345 F.2d at 685-686. The Court there, for example, criticized Judge Platt for using partial statistics as the basis for his decision to refuse transfer.

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[18] Since the first four *Platt* factors were discussed above, only the application of the remaining factors will be discussed.

In the present case, the District Judge ignored the proper criteria, which had been included in the memoranda presented by the Petitioner, and evaluated this factor solely upon the "per-judge" caseload between the two districts involved. Uncontroverted evidence presented by Petitioner showed that the more accurate criterion by which to compare the two districts is the capacity of each district to handle its current criminal caseload. The statistic which offers the most accurate evaluation of this capacity is the length of time which the respective districts require to move a case from initiation to trial. In the latest report of the Administrative Office of the United States Courts, [19] the comparative disposition time for criminal cases is: Central District of California: 4.3 months; Eastern District of North Carolna: 5.0 months (filing to disposition). The report further indicates that as a result of a 2.9% increase in filings during the last year, the disposition time in the Eastern District of North Carolina has increased by .7 months, or more than 8%. In contrast, filings in the Central District of California have dropped since 1973 by 2.6%.

An even more crucial criterion, however, is the comparison of judicial manpower in the two districts. The Central District of California has seventeen judgeships and the Eastern District of North Carolina has only two. The effect of an extended criminal trial on the docket conditions in a two judge district would be devastating. On the contrary, the Central District of California can readily adjust its caseload, even for the protracted three-month trial of this

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[19] Administrative Office of the United States Courts, *Annual Report to the Director*, 1974, pp. A-56, 57; IX-108: amended portion, pp. A-56,57; IX-108.

case. The District Court judge not only ignored these more reliable criteria, but also relied upon figures which were prepared at a time when there were three judges in the Eastern District of North Carolina, neither mentioning nor giving any consideration to the fact that one of his colleagues, Chief Judge Butler, was to retire on July 1, 1975, *without replacement.* Once this information is considered in the balance, it is obvious that the Petitioner's trial will wreak havoc on the trial calendar of the Eastern District of North Carolina.[20]

2. Accessibility of place of trial: location of documents, records and witnesses.

The facts and evidence demonstrating the relative inaccessibility of the Raleigh area when compared with the Los Angeles metropolitan area are a matter of record [21] and were uncontroverted in the District Court. Since it is wholly unsupported by the evidence and delivered without discussion, Petitioner is unable to determine the basis, if any, for the conclusion of the

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[20] In footnote 2 of his memorandum opinion, the District Judge explains that "as a matter of courtesy" he communicated with Judge Hill, one of the judges of the Central District of California. The District Judge thereby received ex parte evidence out of the presence of the Petitioner and his counsel. This "evidence", which was apparently given heavy weight by the District Judge, was not taken under oath, not subject to cross-examination, was self-serving and contradicted the clear weight of the evidence presented in Court by Petitioner. Petitioner strenuously objects to such an egregrious violation of his constitutional rights.

[21] According to the figures provided by the *Federal Aviation Agency Statistical Handbook of Aviation, Calendar Year 1974,* there are more than 15 times as many passenger arrivals into Los Angeles as into the Raleigh-Durham airport. Table 4.7 of the Handbook also shows that the number of airplane departures for Los Angeles was approximately ten times that for Raleigh-Durham.

District Judge that Raleigh is more accessible to the parties and witnesses than Los Angeles.

The record reveals that within the immediate Los Angeles metropolitan area, there are four major airports. The combined traffic of these four airports is *ten times* that of the Raleigh-Durham airport.[22] The difference in accessibility of the two districts by air transportation was further demonstrated to the District Judge by the introduction of the official airline service schedules for each area. In quantity alone, there were *only four* pages of scheduled flights for the Raleigh-Durham area and no *less than forty* pages of scheduled flights into the Los Angeles metropolitan area.

In considering the convenience of the parties in this case, it must be noted that the primary Government attorneys are assigned to the Department of Justice in Washington, D.C. and will be attending the trial from Washington, D.C. There is also one assistant United States attorney who is assigned to the case from the office of the United States Attorney for the Eastern District of North Carolina, James Stroud. Stroud, and Petitioner's local counsel, Durant Williams Escott, are the only attorneys involved in this case who reside in North Carolina.

The inconvenience which will be incurred by the Petitioner if the trial of this case is held in North Carolina is discussed at length above. Likewise, there is a lengthy discussion in an earlier section of the extreme inconvenience which trial in North Carolina will cause to Professor Segal.

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[22] *Ibid.*

Even the conclusion of the District Judge that trial in Raleigh would be more convenient to Mr. Malley in Washington, D.C. than trial in Los Angeles, is not supported by the facts in the record. Mr. Malley testified, without contradiction, and the record was supplemented by tables of airline schedules, that because of the infrequency of airline service, especially non-stop flights, between Washington, D.C. and Raleigh, that in fact it was more convenient for an attorney to fly from Washington, D.C. to Los Angeles.[23] The one to two hours flying time to Raleigh at inconvenient and infrequent times made the frequent five-hour non-stop flights to Los Angeles more convenient in general and in particular to him.

If Los Angeles is, as the evidence shows, the more accessible forum, the factors regarding the location of witnesses, documents and records are easily placed into perspective. Only a very small percentage of the known witnesses in the case are still residing within the Eastern District of North Carolina. Most of the innumer-

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[23] Examination of the airline schedules submitted into evidence reveals the following: From Washington to Raeigh there are only 5 direct, daily flights, each approximately an hour in length. The earliest daily flight to arrive in Raleigh lands at 9:35 a.m. The latest to leave Washington departs at 6:30 p.m. One of these five flights leaves not from Washington but from Baltimore, nearly forty miles from the capital.

On the other hand, flying from Washington to Los Angeles, there are 12 daily direct, non-stop flights and nearly 100 listed connecting flights. There are flights departing Washington from all Washington area airports at all hours of the day and night. It is substantially easier for a busy attorney to schedule an appearance in Los Angeles folowing a full business day in Washington than it is for him to make the one available afternoon flight to Raleigh. The conclusion is inescapable that Raleigh is *less accessible,* even to a near neighbor such as the nation's capital, than is Los Angeles.

able fact witnesses connected to this case were in the Army at the time the murders were committed, and are now scattered all over the United States and in seven foreign countries. Essential character witnesses whom the Petitioner intends to call reside in the Los Angeles area.

Regarding the former Army personnel who have been transferred or discharged, the Los Angeles area is a highly accessible forum from all foreign countries and all parts of the United States. The Southern California area is the home of several major military airports [24] to which military witnesses could be flown with relative ease for the Government. Raleigh, on the other hand, apparently has no scheduled direct flights from anywhere outside the continental United States, and only one nearby military airport, Pope Air Force Base. In a case such as this one, ease of scheduling is critical in minimizing the expense of transporting and lodging witnesses.

Of particular importance here are the several character witnesses whom the Petitioner anticipates calling from the Los Angeles area. These witnesses are all professional persons with heavy scheduling commitments, who may be unable to testify if the trial is held in a distant forum requiring two or three days for their brief appearance. Yet the testimony of these witnesses is *vital* to the defense of the charges lodged against the Petitioner. To require such important character evidence in a serious case to be handled by deposition, as suggested by the District Judge, amounts to a callous disregard for Petitioner's right to a fair trial.

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[24] Norton Air Force Base and North Island Naval Air Station both regularly receive large numbers of overseas flights from all parts of the world.

Regarding the documentary evidence, the Government has conceded that all its complete documents are contained in only two and one-half filing cabinet drawers and that there will be little documentary evidence adduced at trial. Petitioner's voluminous documents and files are located primarily on the West Coast (in Los Angeles and San Francisco). Petitioner further anticipates requests will be made for documents now located in such various places as Washington, D.C. and St. Louis, Missouri. The accessibility of the Los Angeles area applies equally to the interstate transportation of documents as it does to the transportation of witnesses.

3. Special circumstances requiring consideration.

As was set forth in the statement of the case earlier in this Petition, the Petitioner has previously endured the emotional and financial, if not the legal, equivalent of a full trial on these charges. The Petitioner was formally charged with the murders of his wife and daughters and underwent a formal pre-trial investigation convened under Article 32 of the Uniform Code of Military Justice, throughout the proceedings. The Article 32 proceeding against the Petitioner was the longest in the 27-year history of the Uniform Code. Approximately 60 witnesses, including the Petitioner, testified in over 4 weeks of hearings. The expense to the Petitioner, despite the fact that he was provided with free office space, telephones, and other facilities, and some free legal assistance, was over $50,000. The Petitioner was confined a period of nearly five months.

At the conclusion of the Article 32 hearings, the charges against the Petitioner were determined by the

investigating officer to be *"not true"* and were dismissed.

As though one trial were not enough, however, the Department of Justice, five years later, has recommended the prosecution of this case. Although following dismissal of the charges against him, pursuant to the Article 32 proceeding, Petitioner continually sought through personal visits and correspondence to obtain a final disposition of the matter, the Government failed to so act. The delay throughout this period has been *solely attributable to inaction by the Government.*

Despite the fact that high Justice Department officials had twice stated in 1974 that there was no evidence to warrant further prosecution, the Petitioner was indicted on January 24, 1975, just a few weeks before the statute of limitations expired. The indictment was brought solely to avoid threatened accusations of "cover-up" against the Department of Justice by Alfred Kassab, the step-father of the Petitioner's deceased wife, who, though he previously testified as a character witness for the Petitioner at the Article 32 investigation, had conceived an irrational hatred for the Petitioner. Motivated by this hatred, he filed "charges" with the Chief Judge of the Eastern District of North Carolina.

Though these "charges" contained no new evidence,[25] the Justice Department suddenly reversed its previous position and convened a grand jury. The Department of Justice officials involved in the disposition of this case determined that their personal job security might be jeopardized by the Kassab accusations. It should be

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[25] In fact, no new evidence has been produced since 1971.

noted that at least one of the officials involved in the Justice Department's decision was also a key figure who testified at length before the Senate Watergate Committee. It is not difficult to understand the tremendous potential for political pressure which could be generated by someone such as Mr. Kassab in a case which has received highly sensational and widespread press coverage for five years.

The burden imposed by the Government's needless and negligent delay in this case is too heavy for any court to ask Petitioner to bear. The defense of these charges will substantially impair the financial status of the Petitioner wherever the trial is held. But, trial in the distant and inconvenient forum of the Eastern District of North Carolina will bankrupt the Petitioner. Without question, this additional burden to Petitioner has been occasioned by the Government's five-year failure to act in this case. It is too much to ask the Petitioner to bear the cost of defending himself twice against charges of first degree murder and *also* to force upon him the additional burdens of the case which are solely attributable to the unconscionable Government delay in proceeding with this case. Yet, as is seen from a reading of this Petition, no consideration or weight whatsoever was given either to these very important special elements of the case, or to any of the other compelling and uncontroverted reasons advanced by Petitioner. Such abuse of discretion compels this Court to act and to grant the relief requested.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: July 31, 1975.

APPENDIX A

Order of the Fourth Circuit Court

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1621

UNITED STATES OF AMERICA

v.

JEFFREY R. MACDONALD

ORDER

Upon consideration of the United States' motion to dismiss this appeal from an order denying a motion filed by Jeffrey R. MacDonald to transfer this case to the United States District Court for the Central District of California, and the response of Jeffrey R. MacDonald;

It appearing to the court that the order denying transfer is not appealable, *United States* v. *Brown,* 301 F.2d 664 (4th Cir. 1962);

Whereupon, with the concurrence of Judge Craven and Judge Russell, it is ADJUDGED and ORDERED that the appeal is dismissed.

/s/ JOHN D. BUTZE, JR.
John D. Butze, Jr.
United States Circuit Judge

FILED
Jul 1 1975
WILLIAM K. SLATE, II
Clerk

A True Copy, Teste:
WILLIAM K. SLATE, II, *Clerk*

By /s/ DIANE BURK
Diane Burk
Deputy Clerk

APPENDIX B

Order on Motion to Transfer

[Filed May 30, 1975]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 75-26-CR-3

UNITED STATES OF AMERICA, *Plaintiff*

v.

JEFFREY R. MACDONALD, *Defendant*

ORDER ON MOTION FOR TRANSFER

The defendant, Jeffrey R. MacDonald, indicted in this court on three counts of first-degree murder, has filed ten pre-trial motions under Rule 12, F.R.Crim.P. The motions have been extensively briefed and argued before the court over a period of five days, and now ready for ruling is defendant's primary motion under F.R.Crim.P., Rule 21, for transfer of the case to the Central District of California for trial. The motion will be denied.

I.

TRANSFER PURSUANT TO RULE 21(b) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

Defendant first moves that the case be transferred to the Central District of California for the convenience of the

parties and witnesses in the interest of justice under the provisions of Rule 21(b), F.R. Crim.P., which reads as follows:

> "For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district."

The factors to be considered by the court in exercising its discretion on a motion to transfer under F.R. Crim.P. 21(b) have been listed in *Platt* v. *Minnesota Mining & Manufacturing Company*, 376 U.S. 240, 243-244 (1964), as follows:

1. Location of defendant.
2. Location of witnesses.
3. Location of events likely to be in issue.
4. Location of documents and records likely to be involved.
5. Disruption of defendant's business unless the case is transferred.
6. Expense to the parties.
7. Location of counsel.
8. Relative accessibility of place of trial.
9. Docket condition of each district or division involved; and
10. Any other special elements which might affect the transfer.

The murders with which defendant is charged occurred on February 17, 1970, at Fort Bragg, North Carolina, which is in this judicial district. At that time the defendant was serving in the Army as a medical doctor and was stationed at Fort Bragg. His permanent home was on the east coast, but about six months after his discharge from the Army in December of 1970 he moved to California, and for the last three and one-half years has maintained his residence at

Huntingdon Beach, California. He is employed at St. Mary's Hospital in Long Beach, California, as Director of the Department of Emergency Medical Services. In this position he performs certain administrative duties which account for just over half of his annual income of $60,000, the remainder of his income being for professional medical services personally rendered by him.

The defendant has alleged that if the cause is removed to the Central District of California, "he will be able to work continuously at his present position, including evenings and weekends when made necessary by in-court proceedings during the daytime," and the court is satisfied that the defendant could in fact continue to perform some of the services incident to his present employment, particularly in connection with his administrative duties. It is difficult to see how the defendant could practice medicine to any appreciable extent while engaged in the trial of the very serious charges which have been brought against him. The court has therefore concluded that a trial in this district would be more expensive to defendant in terms of lost income than would be the case if the trial were to be held in Los Angeles. It may also be assumed that the defendant's personal expenses in attending a trial in this district will be much greater than would be the case if the trial were were held near his home in California.

A consideration of the factors other than the personal financial hardship of the defendant has led the court to conclude, however, that the convenience of the parties and witnesses and the ends of justice do not require that the motion be allowed. A substantial number of the possible witnesses for the government and the defendant are located in the Eastern District of North Carolina, and there has been no showing that non-resident fact witnesses for either party live in or nearer to California than to North Carolina. The defendant proposes to call a number of character witnesses who reside in California and who have

known defendant since he moved to that state some three and one-half years ago, but it would seem that defendant's character witnesses in position to offer more pertinent testimony would be those who reside on the east coast and who knew the defendant prior to the date of the crime. The government has indicated it will consider stipulating the testimony of defendant's California character witnesses, and perhaps the matter can be handled by deposition.

The murders occurred at Fort Bragg which is in this district, and it is the court's understanding that the documents and records likely to be involved in the case are located in the office of the United States Attorney at Raleigh or in the Department of Justice at Washington, District of Columbia. The defendant has made no showing with respect to the location of any documents and records likely to be involved in the defense of the case.

Chief counsel for the defendant since the first charges were brought against him in 1970 by the military has been Bernard L. Segal, Esq., who at the time of the crime was a resident of Pennsylvania and a member of the bar of that state but who now resides in San Francisco, California, where he teaches in the School of Law at Golden Gate University. Although he apparently practices law in San Francisco, Mr. Segal is not a member of the California bar, and for this reason he would be precluded by Local Rule 1.3 of the District Court for the Central District of California from appearing as counsel for the defendant if the case should be removed to that court for trial.[1]

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[1] The rule provides for *pro hac vice* representation in a case by an attorney not otherwise eligible for admission who is a member in good standing of the bar of another state, but "unless authorized by the constitution or an act of Congress, an attorney is not eligible to practice pursuant to this paragraph if any one or more of the following apply to him: (i) he resides in California; or (ii) he is regularly employed in California; or (iii) he is regularly engaged in business, professional or other activities in California." Each of these condtions appears to apply to Mr. Segal.

Defendant's other retained counsel at this time is Michael J. Malley, Esq., who is a member of a Washington, District of Columbia, law firm. Obviously it will be more convenient for Mr. Malley to attend court in Raleigh which is not more than an hour away from Washington by air than it would be for him to attend court in Los Angeles.

While this is a Fayetteville Division case, the trial will be held at Raleigh which is connected by all forms of transportation with all of the principal cites in the United States including direct air connections to Los Angeles. It thus appears probable that Raleigh is more accessible to the parties and witnesses in the case than would be Los Angeles.

The condition of the docket of this court at this time is reasonably current, and the trial of this case can be commenced here within the next sixty days. Figures provided by the Administrative Office of the United States Courts indicate that the per-judge caseload in the Central District of California is considerably higher than the present per-judge caseload in this district.[2]

The court has considered several "other special elements" advanced by defendant as reasons for the proposed transfer, but these have not been deemed of sufficient merit to outweigh the reasons the government has advanced for retaining the case in this district. For instance, counsel for defendant predicts that the trial of the action may last from four to six months. In view of the fact that a full-blown hearing under Article 32 of the Uniform Code of Military Justice involving witnesses for the government

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[2] As a matter of courtesy the court communicated with Judge Irving Hill of the Central District of California to ascertain the present status of the docket there. He described it as "deplorable," and stated that if the case were transferred to that district and were not because of exigent circumstances accorded some unusual priority, it would be many months if not a year or more before it could be reached for trial.

and defendant required only four weeks of testimony, the court is of opinion that defendant's estimate of the trial time is not realistic. Defendant further contends that he will retain certain expert witnesses, "criminologists," to testify on his behalf and that such witnesses are more readily available on the west coast than in this area. It does not appear that he has retained any such witnesses, however, and there has been no showing that such experts, if needed by defendant, are not available in this area. Defendant alleges that it will be necessary for him and his attorneys to rent office space and furniture, purchase office supplies and equipment, lease telephones and have the assistance of perhaps as many as eight lawyers and law researchers, several investigators and several stenographers. Defendant has not yet retained local counsel to appear with his out-of-state attorneys, as it will be necessary under the Local Rules for him to do, but the court perceives no reason why the facilities of such local counsel when retained will not suffice for defendant's purposes.[3]

II.

Transfer Pursuant to Rule 21(a) of the Federal Rules of Criminal Procedure

As a second ground for his motion to transfer it is alleged "that the defendant would suffer prejudice in the Eastern District of North Carolina in that a fair and impartial trial could not be obtained." This motion is made pursuant to Rule 21(a) which reads as follows:

> "The court upon motion of the defendant shall transfer the proceeding as to him to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the dis-

[3] This court routinely makes available to counsel in protracted cases ample space in the courthouse for conferences and, if needed, secretarial space. A telephone may be installed at the party's expense, and the court's library, of course, is available to counsel.

trict where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district."

The basis for defendant's motion is alleged prejudicial pre-trial publicity. The defendant has introduced clippings of numerous newspaper stories which appeared following the crime in February of 1970 and particularly during the course of the Article 32 proceedings which followed in the spring and summer of that year. The court has reviewed this material, and while it must be conceded that the crime was of a sensational character, the news stories for the most part appear to have been factual in nature and not designed to incite prejudice against the defendant. A substantial part of the publicity appears to have emanated from defendant himself and his attorney in numerous interviews granted by them to the news media. While the court has not seen or read all of this material, it seems safe to assume that it did not include inculpatory disclosures.[4]

More recently the publicity in this district has been the result of the grand jury proceedings which began in August of 1974. The defendant came here voluntarily and testified before the grand jury on two occasions, and on each occasion he submitted to interviews with the press and he and his attorney were regularly seen on newscasts over the

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[4] The court is informed that on at least one occasion the defendant appeared on a national television program, and on the day before the hearings on defendant's motions began in this court there appeared in the Los Angeles Times a feature article of fifty-six column inches in length together with a large picture of the defendant. The material for this article was obviously furnished by the defendant, and in connection with the extensive news coverage of the bail reduction proceedings which were held in Los Angeles in February of 1975 it would seem that the publicity the case is receiving in California approaches that which it is receiving in this district.

local television stations. Following the court's admonition to counsel for the government and the defendant the press interviews appear to have diminished if not ceased altogether since the hearings on defendant's motions got underway, and while these hearings have been regularly reported in all of the news media, the reports of which the court is aware have consisted only of factual reporting of proceedings which occurred in open court, and it is not perceived that the news stories growing out of the grand jury proceedings or the hearings in this court have prejudiced the defendant's right to a fair and impartial trial in this district.

In sum, the court is not satisfied that there exists in the district so great a prejudice against the defendant that he cannot obtain a fair and impartial trial, and in any event, it would be inappropriate to grant defendant's motion for transfer prior to the selection of a jury for the trial of the case. *United States* v. *Abbott Laboratories,* 505 F.2d 565 (4th Cir. 1974); *Wansley* v. *Slayton,* 487 F.2d 90 (4th Cir. Cir. 1973).

Accordingly, it is now

ORDERED:

1. That the motions of the defendant for transfer of the case to the United States District Court for the Central District of California for trial are denied;

2. That this case be transferred from the Fayetteville Division of this court to the Raleigh Division for trial; and

3. That subject to the rulings of the court to be made in the near future on defendant's remaining motions the case in set for trial in Courtroom No. 1, Seventh Floor, Federal Building, 310 New Bern Avenue, Raleigh, North Carolina, at 10:00 a.m. on Monday, July 14, 1975.

/s/ F. T. DUPREE, JR.
F. T. Dupree, Jr.
United States District Judge

May 30, 1975.

APPENDIX C

Financial Statement of Petitioner

JEFFREY R. MacDONALD

BALANCE SHEET

APRIL 30, 1975

ASSETS

Cash	$ 10,000.00
Automobile	8,000.00
Boat	18,000.00
Residence	75,000.00
Furniture and Personal Property	10,000.00
Pension Profit Sharing Plan	7,000.00
Listed Stocks	3,300.00
Land	1,000.00
TOTAL ASSETS	$132,300.00

LIABILITIES

Accounts Payable	$ 2,500.00
Note Payable, Bank of America, Secured by Boat	17,800.00
Note Payable, American City Bank, Secured by Automobile	1,200.00
Note Payable, California Federal Savings, Secured by Residence	28,000.00
Note Payable, Raymond Baker, Secured by Residence	10,000.00
Note Payable, Northwestern Medical School	6,500.00
Loan Payable, Diana Miller Decorator, Inc.	2,000.00
Legal Fees (Various)	18,300.00
TOTAL LIABILITIES	$ 86,300.00
EXCESS OF ASSETS OVER LIABILITIES	$ 36,000.00

JEFFREY R. MacDONALD

PERSONAL INCOME & EXPENSES

JANUARY 1, 1974 THROUGH DECEMBER 31, 1974

INCOME

Salary	$60,000.00

EXPENDITURES

House Payment (Includes Taxes & Insurance)	$ 5,300.00	
Boat Payment	3,400.00	
Auto Payment	1,200.00	
Income Taxes	10,800.00	
Loan to Northwestern University	900.00	
Insurance	700.00	
Non Reimbursed Business Expenses	5,000.00	
Medical	200.00	
Living Expense	25,000.00	
Normal Legal & Accounting	$ 4,000.00	$56,500.00
Excess		$ 3,500.00

APPENDIX D

Comparative Cost of Trial Statement of Petitioner

JEFFREY R. MacDONALD
COMPARATIVE COST OF TRIAL
L.A. vs N.C.

1975

	North Carolina	Los Angeles	Savings in Los Angeles
INCOME	$ 30,000.00	$60,000.00	$30,000.00
FEES			
Legal	40,000.00	35,000.00	5,000.00
Private Investigator	4,000.00	4,000.00	—
Ten Expert Witnesses	3,000.00	3,000.00	—
Local Counsel	8,000.00	—	8,000.00
Typist	1,000.00	—	1,000.00
TRAVEL COSTS			
Defendant	800.00	—	800.00
Mother of Defendant	1,200.00	—	1,200.00
Attorneys—Segal (6)	2,400.00	300.00	2,100.00
—Malley	400.00	800.00	(400.00)
—2 Law Clerks	2,400.00	300.00	2,100.00
Private Investigator (1)	1,000.00	2,000.00	(1,000.00)
Expert Witnesses (10)	4,000.00	200.00	3,800.00
Character Witness (15)	6,000.00	1,200.00	4,800.00
Fact Witness (20)	8,000.00	8,000.00	—
LIVING EXPENSES (Additional)			
Defendant	4,000.00	—	4,000.00
Mother of Defendant	4,000.00	—	4,000.00
Attorney—Segal	3,500.00	3,500.00	—
Attorney—Malley	3,500.00	500.00	3,000.00
Law Clerks (2)	6,000.00	3,000.00	3,000.00
Private Investigator	3,500.00	3,500.00	—
Expert Witnesses	1,200.00	300.00	900.00
Character Witnesses	1,500.00	300.00	1,200.00
Fact Witnesses	2,400.00	2,400.00	—
MISCELLANEOUS			
Auto Rental (2)	2,500.00	—	2,500.00
Telephone	500.00	500.00	—
Paper and Xerox	2,000.00	1,000.00	1,000.00
Court Reporter	4,000.00	4,000.00	—
	$120,800.00	$73,800.00	$47,000.00

APPENDIX E

Affidavit of Petitioner Sur Costs Incurred in Connection With Hearings on Pre-Trial Motions

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
FAYETTEVILLE DIVISION

No. 75-26-CR. 3

UNITED STATES OF AMERICA

vs.

JEFFREY R. MACDONALD

AFFIDAVIT SUR COSTS INCURRED BY THE DEFENDANT IN CONNECTION WITH HEARINGS ON PRE-TRIAL MOTIONS IN SUPPORT OF DEFENDANT'S MOTION FOR TRANSFER
PURSUANT TO RULE 21(b) FED R. CRIM. PROC.

COST OF: 4 (four) days ..... DEFENDANT
4 (four) days ..... Mr. Segal
2 (two) days ..... Mr. Malley
5 (five) days ..... Ms. Simmons
3 (three) days ..... Mrs. Escott

I. FLIGHTS:

$ 380.00 ..... Defendant
$ 380.00 ..... Mr. Segal
$ 380.00 ..... Ms. Simmons
$ 75.00 ..... Mr. Malley
$ 40.00 ..... Mrs. Escott

TOTAL: $1,255.00

II. MEALS: ..... All of the above persons
TOTAL: $ 200.00

III. Rooms and Telephone ..... All of the above persons
Total: $ 325.00

IV. Car Rental ..... All of the above persons
Total: $ 100.00

V. Legal Fees:

$1,500.00 ... Mr. Segal, Chief Defense Counsel
$ 500.00 ..... Mr. Malley, Assistant Counsel
$ 500.00 ..... Mrs. Escott, Local Counsel

Total: $2,500.00

VI. Income Lost by Defendant:
Total: $1,000.00

TOTALS

In North Carolina		If Held in Los Angeles	
I.	$1,255.00	I.	$ 435.00
II.	200.00	II.	200.00
III.	325.00	III.	25.00
IV.	100.00	IV.	—
V.	2,500.00	V.	2,000.00
V.	1,000.00	VI.	—
	$5,380.00		$2,660.00

Differences In:
Expenses/Services for Less Than One Week—$2,750.00
(This Figure Does Not Include the Cost of Preparation)

I declare under penalty of perjury that the above is true and correct.

Dated: 5/7/75

At: Federal Court House Bldg., Raleigh, N.C.

/s/ Jeffrey R. MacDonald
Jeffrey R. MacDonald, Defendant
Crim. Case No. 75-26-Cr. 3

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In the Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-173 and 75-240

JEFFREY R. MACDONALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner was charged with three murders committed in North Carolina, where he used to reside. He moved to transfer the case for trial in California, where he now resides. He now contends that the district court's order denying the motion to transfer is appealable and that the denial of transfer was an abuse of discretion.

On February 17, 1970, petitioner's wife and two daughters were murdered at petitioner's home in

Fort Bragg, North Carolina. Petitioner, then a Captain in the Army Medical Corps, notified the Military Police and told an investigating unit that four intruders had entered his quarters, attacked him, and killed his wife and children. An investigation failed to confirm this story; petitioner was charged with three specifications of murder, in violation of Article 118 of the Uniform Code of Military Justice, 10 U.S.C. 918. After a military preliminary hearing, these charges were dismissed in October 1970 on the ground of "insufficient evidence to justify reference of the charges for trial by court-martial."

We have been informed by the United States Attorney that from December 1970 to January 31, 1971, the Army investigated petitioner's allegations that people involved in the earlier proceedings had committed criminal acts, including perjury and the destruction of evidence. The Justice Department then requested the Army to continue investigating the murder. In June 1972 the Army forwarded to the Department of Justice its voluminous reports of the investigation. The Department of Justice continued the investigation. In July 1974 the Department began presenting evidence to a grand jury in the Eastern District of North Carolina. On January 24, 1975, the grand jury indicted petitioner for murder, in violation of 18 U.S.C. 1111.[1]

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[1] Contrary to petitioner's assertion (Pet. No. 75-173 at 38-40), the grand jury heard substantial evidence that had not been presented at the Army's hearing in October 1970.

On February 23, 1975, petitioner filed a motion, under Fed. R. Crim. P. 21, to transfer the case to the Central District of California, where petitioner had established a residence in the summer of 1971 (some 18 months after the murders). He argued that he could not obtain a "fair and impartial trial" (Rule 21(a)) in the Eastern District of North Carolina, and that a transfer was necessary "[f]or the convenience of parties and witnesses, and in the interest of justice" (Rule 21(b)). The court denied the motion (Pet. No. 75-173 App. B), and on July 1, 1975, the Fourth Circuit dismissed petitioner's appeal on the ground that an order denying transfer is not appealable (Pet. No. 75-173 App. A). On July 10, 1975, petitioner filed in the court of appeals a petition for a writ of mandamus to direct the district court to set aside its order denying the motion for a transfer.[2] The court of appeals denied that petition on July 15, 1975 (Pet. No. 75-240 App. A). Petitioner seeks review of both the July 1 and July 15 orders. Both petitions contest only the denial of relief under Rule 21(b).[3] However, there is no con-

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[2] The district court also denied petitioner's other pretrial motions, including motions to dismiss the indictment on speedy trial and double jeopardy grounds. The court of appeals has stayed petitioner's trial pending appellate review of the denial of these motions.

[3] Rule 21(b) provides:

> For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district.

flict among the circuits on any of the issues petitioner presents. Petitioner's contentions turn upon the rather unusual facts of his case, and he presents no question of general importance requiring review by this Court.

1. Petitioner contends (Pet. No. 75-173 at 12-22) that the court of appeals erred in holding that the district court's denial of his Rule 21(b) motion is not appealable. It is settled, however, that such an order is not a final judgment and is therefore not appealable. *United States* v. *Foster*, 296 F.2d 249 (C.A. 4); *United States* v. *Brown*, 301 F.2d 664 (C.A. 4); *Semel* v. *United States*, 158 F.2d 231 (C.A. 5); *United States* v. *Garber*, 413 F.2d 284 (C.A. 2); *Auerbach* v. *United States*, 347 F.2d 742 (C.A. 5), certiorari denied, 382 U.S. 958; *Holdsworth* v. *United States*, 179 F.2d 933 (C.A. 1). Cf. *United States* v. *National City Lines*, 334 U.S. 573, 594; *Parr* v. *United States*, 351 U.S. 513, 518.

Petitioner argues that his chief attorney would be unable to conduct his defense if the trial were to take place in North Carolina, and that a trial in North Carolina would be twice as expensive as a trial in Los Angeles, thereby exposing him to bankruptcy. Assuming *arguendo* (but see pages 7-11, *infra*) that these allegations are accurate, there is still no justification for treating the district court's denial of the Rule 21(b) motion as an appealable order. An interlocutory order does not become appealable merely because compliance may be costly. Nor can petitioner reasonably argue that representation by any lawyer other than

Mr. Segal would deprive him of effective assistance of counsel. It is true that petitioner will have to hazard a trial in North Carolina before he can appeal the district court's refusal to transfer his case; as this Court observed in a similar context, however, "bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship."[4] *Parr* v. *United States, supra,* 351 U.S. at 519-520 (quoting *Cobbledick* v. *United States,* 309 U.S. 323, 325).

Petitioner's reliance on *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, is misplaced. *Cohen* involved a collateral order that could not be reviewed at all unless reviewed before trial. See *United States* v. *Ryan,* 402 U.S. 530, 533. The order in the instant case, by contrast, is but one step toward a final judgment; it will be reviewable at that point if petitioner is convicted.[5] Moreover, *Cohen*

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[4] Contrary to petitioner's suggestion (Pet. No. 75-173 at 18), the events that occur during the trial will provide an appellate court with additional information bearing on the question whether the denial of the motion to transfer was an abuse of discretion. Petitioner's argument that the district court abused its discretion is based in large part on his estimates (many of them disputed by the government) relating to factors such as the length of trial, the number and location of witnesses, expenses to be incurred, and so on. After trial, these disputed estimates will become known facts.

[5] *Cohen* also stressed (337 U.S. at 547) that the order at issue there presented a "serious and unsettled question" of law; the appealability question would have been differently decided, the Court stated, if the order involved (as it does here) merely an exercise of discretion.

was a civil case. This Court has stressed that piecemeal review is "particularly damaging to the conduct of criminal cases." *DiBella* v. *United States*, 369 U.S. 121, 124; *Cobbledick* v. *United States*, *supra*, 309 U.S. at 324-326. See *Berman* v. *United States*, 302 U.S. 211, 212-213. Petitioner argues as if the lack of pretrial appeal has deprived him of meaningful consideration of his contentions. But his arguments have been fully presented to the district court, which ruled against him. The Due Process Clause requires no more, for, as this Court has repeatedly held, there is no constitutional right to appeal, even on the merits of guilt or innocence, in a criminal case. *Ross* v. *Moffitt*, 417 U.S. 600; *McKane* v. *Durston*, 153 U.S. 684.

2. The court of appeals also properly denied the petition for a writ of mandamus. Mandamus will lie to review an interlocutory order in a criminal case only when the district court's ruling is not only incorrect but also outside the scope of its legitimate authority. See, *e.g.*, *Parr* v. *United States*, *supra*, 351 U.S. at 520-521; *Jones* v. *Gasch*, 404 F.2d 1231 (C.A.D.C.), certiorari denied, 390 U.S. 1029. Although petitioner argues that the district court has abused its discretion, he has not argued (nor could he) that the court overstepped its authority by requiring him to stand trial in the district in which the crime was committed.[6] The district court was

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[6] Mandamus sometimes is appropriate to redress abuse of discretion, but this use of the writ is appropriate only when

entitled to determine (Pet. No. 75-173 App. 3a-8a) that petitioner should be tried in the vicinage of the crime. Although a trial in North Carolina would be more expensive to petitioner than one in Los Angeles (*id.* at 5a), the court held that petitioner's allegations of financial hardship are exaggerated [7] and that, in any event, the financial hardship to petitioner would be outweighed by other considerations.

The "location of events likely to be in issue" (*Platt* v. *Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 244) is the Eastern District of North Carolina, the district where the crime was committed and

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the court has issued an order for which there is no remedy by appeal. The Fourth Circuit itself has issued mandamus to correct an abuse of discretion during discovery (*Board of Parole* v. *Merhige*, 487 F.2d 25, certiorari denied, 417 U.S. 918). Mandamus might often be an appropriate remedy when invoked by the government, for no appeal from an erroneous acquittal is possible and mandamus may be a necessary device to preserve the government's rights under the Criminal Appeals Act. Petitioner's case is not an appropriate one for the use of mandamus to correct an abuse of discretion, however, because the propriety of the district court's decision not to transfer his case can be reviewed on appeal.

[7] With respect to petitioner's claim that he could continue with much of his work as a doctor if the trial were in Los Angeles, the court noted (Pet. No. 75-173 App. 5a): "It is difficult to see how [petitioner] could practice medicine to any appreciable extent while engaged in the trial of the very serious charges which have been brought against him." The court also found (*id.* at 7a-8a) that petitioner overestimated the likely length of the trial as well as the added expense in Raleigh of renting office space and equipment and hiring secretaries, stenographers, and expert witnesses.

where petitioner and his family lived at the time of the offense.[8] As the government informed the district court (Response to Motion for Transfer, p. 13), the prosecution desires the jury to view the scene of the crime (petitioner's former residence at Fort Bragg), which has been preserved since the crimes were committed. A jury view of those quarters will contribute substantially to an accurate understanding of the evidence in this case.

The district court also correctly concluded (Pet. No. 75-173 App. 5a-6a):

> A substantial number of the possible witnesses for the government and [petitioner] are located in the Eastern District of North Carolina, and there has been no showing that non-resident fact

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[8] Petitioner has no constitutional right to be tried in Los Angeles simply because he established residence there subsequent to the crime. *Platt, supra,* 376 U.S. at 245. Indeed, the Constitution contains two provisions to ensure that a person be tried where the offense was committed. Sixth Amendment; Art. III, Sec. 2. We recognize that these provisions were written in an age of restricted travel and mobility. Their effect, therefore, was often to ensure trial at the place of defendant's residence. But this is not to say that a resident of one State who commits a crime there is entitled to be tried wherever he later chooses to reside. See Wright, *Federal Practice and Procedure (Criminal)* § 301, pp. 581-582 (1969):

> Those [on the Court] who have argued, sometimes for the majority and sometime in dissent, that the policy of the Sixth Amendment favors trial at defendant's residence would assert only that where it can reasonably be said that the offense was committed at the defendant's residence, this is where he ought to be tried.

witnesses for either party live in or nearer to California than to North Carolina.[9]

With respect to petitioner's allegations that *"all"* (Pet. No. 75-240 at 13) of his character witnesses reside in California, the court observed (Pet. No. 75-173 App. 6a) that the "character witnesses in position to offer more pertinent testimony would be those who reside on the east coast and who knew [petitioner] prior to the date of the crime." Accordingly, Raleigh, North Carolina—"which is connected by all forms of transportation with all of the principal cities in the United States" (*id.* at 7a)—is quite possibly "more accessible" (*ibid.*) to the parties and witnesses than is Los Angeles.[10]

The docket conditions of the two districts involved also support the denial of the motion to transfer. The docket in the Eastern District of North Carolina per-

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[9] The government informed the district court that, of the 108 prospective witnesses for the prosecution, 38 live in the Eastern District of North Carolina, 44 live outside of that district but in the Eastern time zone, and only 8 live in the Pacific time zone (Response to Motion for Transfer at 5-6).

[10] In an attempt to show the greater accessibility of Los Angeles (Pet. No. 75-173 at 34-38; Pet. No. 75-240 at 43-46), petitioner asserts (Pet. No. 75-173 at 36) that it is more convenient to commute between Washington, D.C. (where an associate defense counsel works) and Los Angeles than between Washington, D.C. and Raleigh. The flight time from Washington, D.C. to Los Angeles is about 5 hours. There are five daily nonstop flights from the Washington area airports to Raleigh and three daily "through" flights making one stop. The longest of these eight daily flights takes 2 hours and 30 minutes. Official Airline Guide, North American Edition (October 1, 1975), pp. 467, 718.

mitted the trial to be set for August 1975 (although its commencement has been stayed, at petitioner's behest, by the court of appeals). On the other hand, if the case were transferred to the Central District of California "it would be many months if not a year or more before it could be reached for trial" (*id.* at 7a, n. 2).[11]

Finally, petitioner's claim (Pet. No. 75-173 at 9, 17, 21, 22, 27-30; Pet. No. 75-240 at 9-10, 13, 16, 22, 24, 36-40) that the failure to transfer his case will make it impossible for Mr. Segal to represent him is unpersuasive. Indeed, Mr. Segal himself vacillates on this matter. Both petitions for certiorari assert that it would be impossible for Mr. Segal to conduct the defense if the trial is held in North Carolina. But petitioner's Motion to Transfer (p. 14) alleged only that a trial in North Carolina would

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[11] Petitioner asserts (Pet. No. 75-173 at 34) that Chief Judge Butler, one of three judges in the Eastern District of North Carolina, retired on July 1 without replacement. We are informed that Judge Butler has resigned as Chief Judge but still is an active judge and plans to continue to hold court as frequently as before. Moreover, contrary to petitioner's assertions (Pet. No. 75-173 at 34, n. 20; Pet. No. 75-240 at 41-42, n. 39), it was entirely appropriate for the district court to communicate with Judge Hill of the Central District of California to ascertain the present status of the docket there. Judge Hill could properly take judicial notice of the time that would probably elapse before petitioner's case could be tried in Los Angeles; the district court below could properly rely on that information—especially because petitioner's statistics comparing the "disposition" time in each district are inconclusive for a number of reasons (such as the failure to take account of guilty pleas).

create a "substantial likelihood" that Mr. Segal would be unable to represent petitioner. And Appendix D to each petition asserts that the cost of a trial in North Carolina would include $2,400 for Mr. Segal's transportation and $3,500 for his living expenses. However that may be, Mr. Segal probably cannot represent petitioner in California should the case be transferred; Mr. Segal "is not a member of the California bar, and for this reason he would be precluded by Local Rule 1.3 of the District Court for the Central District of California from appearing as counsel for [petitioner] if the case should be removed to that court for trial" (Pet. No. 75-173 App. 6a).[12]

The district court's opinion reflects a careful and balanced consideration of the ten relevant factors

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[12] Relying on *Munoz* v. *Hauk*, 439 F.2d 1176 (C.A. 9), certiorari denied *sub nom. Curtis* v. *Munoz*, 404 U.S. 1059, petitioner argues (Pet. No. 75-240 at 13) that attorneys in Segal's position have been allowed to appear in the Central District of California despite Local Rule 1.3. But *Munoz* involved a conflict among the district judges concerning whether a now-revoked local rule permitted attorneys residing in the Central District to appear *pro hac vice* if they did not maintain a law office in the district; the Ninth Circuit resolved the ambiguity in favor of the attorney seeking admission. The local rules were amended and now clearly prohibit Segal's appearance on three independent grounds. Because of Local Rule 1.3, Segal was recently not allowed to appear as petitioner's counsel of record in a bail reduction hearing before a Magistrate in Los Angeles, even though the government consented to Segal's appearance at that hearing. Although it is conceivable that Mr. Segal could persuade the Ninth Circuit to relieve him of the effect of Local Rule 1.3, such proceedings could take many months, making trial in California still less attractive compared to the prompt trial available in North Carolina.

articulated in *Platt, supra,* 376 U.S. at 243-244.[13] The district court's refusal to transfer was a proper exercise of its discretion; no exceptional circumstances exist to justify relief at this stage of the proceedings.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

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[13] Petitioner's allegations that the court failed to appreciate important facts are unpersuasive. For example, petitioner states (Pet. No. 75-240 at 15) that the district court erred in finding that he had not retained local counsel to appear with his out-of-state attorneys. But the point of the court's reference to petitioner's failure to use local attorneys was that local counsel would help reduce petitioner's expenses. Similarly, there is nothing to indicate that the district court "ignored" petitioner's claim (Pet. No. 75-240 at 16) that Segal would be unable to represent him in the Eastern District of North Carolina. The court's opinion (Pet. No. 75-173 App. 6a) simply emphasized the more important consideration—that the Local Rules of the Central District of California clearly prohibit Segal's appearance *there.*

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